IN THE

Supreme Court of the United States

OCTOBER TERM 1943

NO.

CELIA STRICKLAND ET AL.
Petitioners

vs.

HUMBLE OIL & REFINING COMPANY ET AL.
Respondents

AND

JASPER POOL ET AL.
Petitioners

vs.

HUMBLE OIL & REFINING COMPANY ET AL.
Respondents

Petition For a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and Brief In Support Thereof.

To The Honorable The Chief Justice, And Associate Justices Of The Supreme Court Of The United States:

Come now Celia Strickland and the others as plaintiffs in the original action instituted in U. S. District Court for the Southern District of Texas and Jasper Pool and the other named intervenors in the proceedings in that court and pray that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit to review here the record and judgment enter-

ed by that court on the 4th Day of March, 1944 by a divided bench denying a motion for rehearing and adhearing to a judgment entered by that court on the 17th. day of January 1944 in a cause wherein petitioners were appellants and Humble Oil & Refining Company and others were appellees. (R 566-620).

OPINION BELOW

The opinion of the United States Circuit Court of Appeals for Fifth Circuit is reported in advance Sheet, Federal Reporter of date, March 13, 1944.--140 Fed. Reporter 2nd. No. 1 -- Page 83 et seq. and the judgment and proceedings in reference thereto are fully set out in the record -- (R 566-573-620-631).

SUMMARY STATEMENT OF THE MATTERS INVOLVED

PART ONE

A person bearing the name of Wilson Strickland, was in Texas prior to 1838 and a survey of a one third league of land was made for him and in his name. (R. Page 170 - 171). The quantity of land to which this Wilson Strickland was entitled, was by virtue of a certificate issued by the Board of Land Commissioners of the County of Harrisburg in the then Republic of Texas. (R 215).

This Wilson Strickland signed his name by his X mark.

Letters patent was in the name of this Wilson Strickland and his heirs and assigns on the 3rd. day of July, 1847 and by this letters patent, the state of Texas conveyed this particular one-third of a league of land

to this Wilson Strickland and his heirs and assigns. (R. 172 - 173).

In 1937, Celia Strickland and other original parties plaintiff brought their action in trespass to try title to a portion of the land comprising the one third of a league as patented, as well as to recover damages against Humble Oil and Refining Company and other defendants as named, which was a suit at law, returnable to the District Court of the United States for the Southern District of Texas.

The suit as filed involved a controversy between citizens of different states and involved an amount exceeding the sum of three thousand dollars and the United States District Court for the Southern District of Texas had jurisdiction of the subject matter and the parties. To the suit as filed, the defendants made answer.

The case as made came on to be tried upon the issues as made by the pleadings before a jury duly impanneled, with his Honor, James V. Allred, Judge of the United States District Court for the Southern District of Texas, presiding.

During the progress of the trial and after much testimony had been offered, the Court announced that the testimony would be confined to the question of IDENTITY and upon the conclusion of the introduction of evidence and upon argument of counsel being had, the Court in its charge, restricted the finding of the jury to the one issue:

"Do you find from a preponderance of the evidence that the Wilson Strickland who was the son of Jacob and Priscilla Strickland, of Franklin County, Georgia and under whom plaintiff and intervenors

claim, was the same person as the Wilson Strickland for whom the one third of a league of land in Montgomery County, Texas, was surveyed in 1838?"

Upon considering the evidence as submitted and under the charge of the Court as delivered, restricting the finding to the issue as directed, the jury returned an answer in the negative and the Court entered judgment to the effect that the plaintiffs and intervenors as named never owned any right, title or interest in and to the lands the title to which was in dispute. (R 71-85).

Thereafter, Celia Strickland and other parties plaintiff to the original suit, by and through their attorneys, moved the court to set aside the verdict of the jury as rendered, setting forth in said motion the grounds relied upon. (R 85 - 87).

On the same date, intervenors, P. E. Phillips and other intervenors, filed their motion to have the verdict as rendered set aside upon the grounds as urged. (R. 88 - 89).

Likewise, on same date, Dennie Beckam, and other intervenors filed a motion to have the verdict as rendered set aside upon the grounds as urged. (R 89 - 90).

Thereafter the Court entered judgment overruling the motion for new trial (R 97).

Thereafter, the parties plaintiffs and intervening parties plaintiff represented by the several groups comprising parties affected by the judgment overruling the motions for new trial as filed, gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, appealing from the final judgment entered in said cause and the order overruling the motion for new

trial entered in the stated cases (R 552 to 563) and gave bond, appealing said cause to the United States Circuit Court of Appeals for Fifth Circuit in terms of the law. (R 95 to 108) inclusive.

Thereafter the case came on to be heard upon the errors as assigned and designation of points on appeal. (R 109 - 129) in the United States Circuit Court of Appeals for the Fifth Circuit--Justices Sibley, Holmes and Waller presiding, who upon hearing argument, rendered judgment on January 17, 1944 affirming the judgment of the lower court.

Thereafter and within the time as allowed, the appellants in the stated case, filed a motion for rehearing and upon considering the motion for rehearing, the court by a divided bench, entered judgment March 4, 1944, denying appellants' motion for rehearing--Justice Holmes dissenting.

Thereafter, appellants gave notice of intention to apply to the Supreme Court of the United States for the issuance of a writ of certiorari, directed to the United States Circuit Court of Appeals, Fifth Circuit, appealing said case to the Supreme Court of the United States and requested that the mandate of the United States Circuit Court of Appeals be stayed, pending the filing of the petition for the writ of certiorari and judgment of the court was entered staying the mandate as prayed. (R 622).

Thereafter, and pending the stay of the mandate of the United States Circuit Court of Appeals and before the filing of the petition for certiorari, and while the United States Circuit Court of Appeals for Fifth Circuit retained jurisdiction, appellants in said cause

filed a motion praying that the United States Circuit Court of Appeals for Fifth Circuit, reconsider its action in denying the motion of appellants for a rehearing, and that appropriate order be passed, granting the request for such reconsideration and that judgment be entered reversing the judgment of the lower Court.

That thereafter the motion to reconsider was duly filed in the Clerk's office of the United States Circuit Court of Appeals (Fifth Circuit) and that the Court giving consideration to the motion to reconsider--the court entered judgment and order on the first day of May, 1944, denying the motion to reconsider. (R. 631).

The matters involved are predicated upon assignments of error as related to the ruling of the United States Circuit Court of Appeals (Fifth Circuit) in affirming the judgment of the United States District Court for the Southern District of Texas, in its rulings as to the introduction of testimony and as to the assignment of error upon the exceptions as taken to the charge of the Judge of the United States District Court for the Southern District of Texas, as affirmed by the United States Circuit Court of Appeals (Fifth Circuit).

Petitioners contending that such affirmance affected fixed rules of the law of evidence--and fixed rules of law as related to local law and conflicting with local decisions and in conflict with other United States Circuit Courts of Appeals on the same matter.

PART TWO

Basis of Supreme Court's Jurisdiction

To Review Judgment.

Questions Involved.

The jurisdiction of the Court is invoked under Section 240 (a) of the judicial Code as amended by the act of February 13, 1925--(28 - U. S. C. A. Sec. 347) which reads as follows:

"In any case, civil or criminal, in a Circuit Court of Appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant to require by certiorari, either before or after judgment or decree, by such lower court, that the cause be certified to the Supreme Court for determination by it, with the same power and authority and with like effect, as if the cause had been brought by unrestricted writ of error or appeal."

Petitioners assign as error:

The judgment of the United States Circuit Court of Appeals (Fifth Circuit) as entered on the 4th day of March 1944, by a divided bench, denying a motion for rehearing and adhering to its judgment, affirming the judgment of the United States District Court for the Southern District of Texas as entered in said original case.

Petitioners contending that the judgment of the United States Circuit Court of Appeals (Fifth Circuit) in affirming the judgment of the lower court, was in

conflict with the decisions of another United States Circuit Court of Appeals:

And also contend that the United States Circuit Court of Appeals, Fifth Circuit, has decided an important question of local law in conflict with local applicable decisions.

Petitioners further contend that the judgment of the United States Circuit Court of Appeals Fifth Circuit, as entered and the rulings therein made are such a departure from the accepted and usual course of judical proceeding, as to call for an exercise of this court's power of supervision.

PART THREE

REASONS FOR GRANTING THE WRIT:

1st.

The decisions as rendered by the United States Circuit Court of Appeals (Fifth District) by a divided bench in the case at bar is in conflict with applicable decisions of last resort in Texas, which state is within and forms a part of the Fifth United States Circuit Court of Appeals and has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter.

In that: the decision under review held:

"That Identity of Name did not presumptively show identity of Person." (R 568).

It has been repeatedly held by the courts of last resort in Texas that identity of name is identity of person.

In the case of

Borden Vs. Freeland
189 S. W. 721

It is held:

"Identity of name is prima facie evidence identifying one and the same person."

On page 722 of the same volume:

"It seems therefore that the trial court has a right to conclude that appellants were claiming under a common source, to-wit: J. K. Freeland, appellants' contention--there was no such evidence on the theory that there was no evidence identifying the W. T. Wooten who was the heir of J. K. Freeland as the W. T. Wooten who conveyed to J. A. Commack. The contention ignored the rule which treats identity of name as prima facie evidence, identifying one and the same person."

See also:

McDoel Vs. Jordan et al
Civil Court of Appeals -- Texas
151 S. W. 1178 (4th. head note)

Pyle Vs. Davison et al
Civil Court of Appeals -- Texas
116th. S. W. 823

which last case holds:

"Identity of name is prima facie evidence of person." These Texas cases are in perfect harmony with an unbroken line of state policy as related to cases sounding in trespass to try title to lands, holding that when the name of the patentee and the name under whom claimants assert title are indentical that the presumption arises -- that the persons are the same.

In the case at bar, the person who was the patentee of the lands in controversy, bore the name of Wilson Strickland (R 172).

This Wilson Strickland signed his name by his X mark. (R 404 - 405).

The person under whom appellants in the court below asserted title bore the name of Wilson Strickland (R 174) and this Wilson Strickland signed his name by his X mark. (R 177).

The names were identical and the signatures were identical.

The rule in Texas relating to identity in name as being presumptive of identity of person was binding upon the Circuit Court of Appeals for the Fifth Circuit.

The decision as rendered in the lower Court to the effect that identity in name did not presumptively show identity of person was not only in conflict with local decisions, but was also in conflict with decisions of other circuit courts.

In the case of

Marimeis Vs. Sheeran
31st. Federal Rpt. 976

It is held:

"In view of identity of names in actions of husband and wife, the court must assume husband was the plaintiff in one of the actions."

This case was from the Circuit Court of Appeals Second Circuit, and reversed the judgment of the district court holding to the contrary. See also:

Faust Vs. United States
163 U. S. 452.

Above cited case from the District Court Northern District of Texas.

Miller & Son Vs. Petrocelli
236 Federal Reports Page 846

From Ninth Circuit Court of Appeals, affirming the case above noted.

In the ruling as complained of -- the Court says: "That there is evidence in the case of several Wilson Stricklands in life at or about the critical time, four of them in Georgia -- they were clearly different persons and yet, all had the patentees name. The identity of name does not prove the patentee to have been appellants' Wilson Strickland any more than each of the others."

In making this statement, the court evidently overlooked that it affirmatively appears from the record that every person who bore the name of Wilson Strickland, whether in Georgia, or elsewhere, who it was claimed to have been in life at the critical time -- other than appellants' Wilson Strickland, had been definitely accounted for and definitely put out of the picture by the facts as stipulated to be true. (R 159).

The statement made by the court, however, is not germane to the exact point which was being decided. The question before the court on this assignment of error was, did the burden of proof shift at the point at which a prima facie case was made?

Whether any other person bearing the name existed or did not exist, would have to be in the nature of a

rebuttal to the prima facie case and we insist that in making proof of this counter contention the burden was on appellees.

The court in the same connection says that the evidence does not show where the patentee went, or what became of him. The court evidently overlooked the record. Wilson Strickland, the patentee, was not shown to have been in Texas after 1838 -- He was definitely not in Texas in 1847 and had not been for some time. (R 403).

Appellants' Wilson Strickland died in Arkansas, adjoining state to Texas, in 1841. (R 212). This was about three years after the date of the last appearance of Wilson Strickland, the patentee in Texas. (R. 403).

We contend that with no proof to the contrary, that Wilson Strickland, the patentee, was fully accounted *for in the death of appellants* Wilson Strickland in Arkansas in 1841.

2nd

For the further reason:

That the decision of the United States Circuit Court of Appeals for the Fifth Circuit, in holding that "Identity in name when proven did not shift the burden and that upon a prima facie case being proven, that the burden was not shifted to the opposite party." (R. 568) was in conflict with applicable local decisions and was in conflict with the decisions of other Circuit Courts -- and the decision as made departed from the accepted and usual course of judicial proceedings.

It has been held:

"The burden of evidence, or as it is sometimes termed, the burden of going ahead with the evidence is controlled by the logical necessities of making proof which a party is under at the time, the burden being always on the party against whom the decision of the tribunal would be given if no further evidence was introduced -- and this burden so continues until the party with the burden of proof establishes a prima facie case by proof of facts, which either alone, or in conjunction with presumptions of law or fact legally applicable will result in an established case, if not rejected by counter evidence.

When such a prima facie case is established the burden shifts to the party who has not the affirmative."

Corpus Juris 22 Sec. 22.

This statement of the law has been uniformly followed by many jurisdictions and has been expressly adhered to by the Texas Courts.

Smith Vs. Gillon
15 S. W. 796

In which it is held:

"Appellees having made a prima facie case, the burden of the proof shifts."

In the case at bar appellants in the court below contend that upon proving that the person under whom they claim title, bore the identical name and had the identical signature of the person who was the patentee of the lands in dispute, that a perfectly good prima facie case was made and that upon such proof being made, the burden of evidence shifted and it then became the

duty of the opposite parties to prove that the Wilson Strickland under whom appellants in the court below asserted title, was not the Wilson Strickland, the patentee; and appellants contended in the court below that the trial judge in the U. S. District Court in Texas erred in not so charging. (R 127).

The District Court judge in his charge emphasized over and over as to the burden which plaintiffs and intervenors were to carry, but was silent as to when and at what time the burden shifted. (R 49 etseq.).

The charge of the court was excepted to and error was assigned thereon (R 127) and the judgment of the U. S. Circuit Court of Appeals in affirming the decision of the District Court in so far as related, was in conflict with local decisions applicable and was in conflict with established rules of law.

The Chamblee case as cited in the decision is not applicable. In the Chamblee case, the names were not identical; there was only a similarity in name and the Texas Court makes the distinction holding that when the name is identical, the presumption existed and where there is only a similarity, other proof is required.

Appellants in the court not only proved identity in name and signature, but also proved that the claimant lived in Tennessee at one time. (R 333).

Wilson Strickland, the patentee served in the army of the Republic of Texas in a company of Tennesseeans (R 303). Appellants' Wilson Strickland fought in thhe war in Texas and acquired land while in Texas. (R 374).

The Wilson Strickland who fought in the Army of the Republic signed his name by mark. (R 312).

Wilson Strickland, the patentee, arrived in Texas in 1829 and was not shown to have been in Texas after April 18, 1838. (R 404 - 405).

He was definitely absent from the state of Texas on August 18, 1847 and had been for some time prior to that date. (R 402). Appellants' Wilson Strickland was not shown to have been in Georgia from July 1828 (R 350) to the year 1839. (R 369) so it appears that the conclusion of the court in passing upon this presumption are not sustained by the record.

3rd.

For the further reason:

It appears from the record that in the trial of the case in the United States District Court, Mrs. A. C. Barnes, as a witness for defendants, was allowed to testify over timely objections made by plaintiffs.

1st.

"That her father had told her that he was a little boy when he came to Texas."

2nd.

"That her father from time to time discussed with her his people, who they were, and where they came from and that he was always talking about his people."

3rd.

"That her father told her that he came to Texas to live with his uncle Wilson Strickland."

4th.

"That her father told her that her uncle couldn't

read nor write, but he got somebody to write a letter back to the witness's grandfather to ask for the witness' father or some of the other boys to come out here and live with him and that he had a place here and expected to stay in Texas and wanted some of them to come and live with him."

5th.

"That her father told her that her grandfather was too small to come -- too young to leave home, but there was a caravan of eastern North Carolina people coming through there and they said if he would let him come, they would see that he got with his uncle."

6th.

"That her father told her that he came to Texas and lived with his Uncle Wilson Strickland on the land that his Uncle Wilson Strickland got from the government."

7th.

"That her father told her that he lived with his Uncle Wilson Strickland on the place that his Uncle Wilson Strickland got from the government until this man by the name of Vince came there to live with him and he was very disagreeable."

8th.

"That her father told her that they couldn't get along good together and her father was worried terribly about it, because Vince was there, but of course he was there, and he had to stay there -- he couldn't get rid of him."

9th.

"That her father told her that Mr. Vince got rid

of Wilson Strickland and her father came in one day and asked where his uncle was and Mr. Vince told him he had gone back to North Carolina and her father said, "I don't believe that."

10th.

"That her father told her that he wanted to stay on the land and that he told Mr. Vince that his uncle had given him a piece of this land promised his father that if he would let him come, he would give him some of it, enough to make a home there with him and that her father said, I will just get on whatever part of it you want me to and stay there until I hear from my uncle until he comes back,, and that Vince said, "Well, your uncle is never coming back."

11th.

"That her father told her that he said to Vince, "Well, I will stay here until I hear from him" and that Vince said, "No, you won't. I want this land for myself. I bought all of it and I don't want you here any more than I did him."

12th.

"That her father told her that he then said, "Well I don't know nobody. I don't have no place to go, and that Vince said, "Well, you have to go away from here because this is my land."

13th

"That her father told her that he then went away, working around at any thing he could do thinking he could hear from his uncle, but he didn't hear from him, so he finally decided he would go back to North Carolina and see if he could find him and when he went

back, then they said that they hadn't heard of him since he left there to come to Texas -- hadn't heard of him since he came back to live on this land -- hadn't heard of Uncle Wilson Strickland since he left North Carolina to come to live there on that government land. He left there to come to live on it the rest of his life and he never went back there like Vince said he did."

14th.

"That her father said to her: "Well, they were selling land there in North Carolina in Stricklandville and he bought him a little piece of land there and thought he would stay there until he heard from his uncle, but that her uncle didn't come back."

15th.

"That her father told her that he got to thinking about his uncle and wondering where he was and that her father said he believed he was still in Texas and he thought he would come back to Texas and hunt him up."

16th.

"That her father told her he came back to Texas to hunt his uncle Wilson Strickland -- when he got here he just went around different places."

That exceptions to the evidence as offered was made to each separate statement on the ground that the same was hearsay and self serving as set forth in assignments of error 1 - 16. (R 109 - 114).

That the Circuit Court in passing upon these assignments of error (R 570 - 571)--decided that this evidence was competent and sustained the judgment of

the District Court in overruling the objections as made to this evidence.

The decision of the Circuit Court in holding that the evidence of the witness, Mrs. Barnes, as competent and the decision of the court in affirming the judgment of the District Court in overruling the objections to the testimony as offered was in conflict with applicable local decisions.

In the case of
Byers Vs. Wallace
87 Tex. - page 503
28 S. W. 1059.

The Court says:

"That the declarations of William Wallace under whom plaintiffs claim--to the effect that he had a nephew in Texas named William Wallace who was killed at Goliad in the Fannin massacre -- the evidence shows that if the declarations were true, the declarant was the only heir of the property to whom the declaration related.

It was a self serving declaration made in the interest of the declarant and should have been excluded."

In the case at bar it appears from the record in this case that the witness, Mrs. Barnes, the declarent, was the daughter of a deceased nephew of the Wilson Strickland referred to and was a claimant to the land in controversy and that if the declaration was true, the declarant would have inherited an interest in the property.

It appears from the record that this witness was a daughter of an alleged Alfred Strickland who was a grandson of an alleged Absolam Strickland. (R 495 - 496) and that the alleged Wilson Strickland was a son of this Absolam Strickland. It also appears that she,

the witness testified that she was claiming the land in controversy and had formerly had a suit at Conroe for this land. (R 504).

It also appears from the record that in the suit in which this witness was a party, that the verdict as rendered was:

"That there was not a Wilson Strickland, son of Absalom and Sarah Strickland, of Duplin County, North Carolina." (R 159).

Clearly, the testimony of this witness was hearsay of the rankest kind -- was self serving in the extreme and was highly predudicial and should have been excluded.

The Circuit Court of Appeals was bound by the ruling in the Byers case as noted, and should have followed it.

Erie Railroad Company

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Thompkins 304 U. S. Page 64

which expressly hold that "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state."

Justice Holmes seems to have taken this view, where on the motion for rehearing he dissented from the first decision as rendered.

The court in commenting on this evidence, says: "While this evidence was vivid and if believed, forceful, it was admissible though hearsay for the purpose for which it was offered."

We can see no purpose that would authorize hearsay or self serving declarations. The evidence went be-

yond the scope of mere kinship, and was objectionable, even under the citation referred to in the court's decision, and was certainly in conflict with the Byers case.

The Circuit Court says in its decision "We have considered the charge of the court and do not think it unduly stresses the burden of proof as being on appellant. Its reference to the ring of a true coin as compared to the dull thud of a false one in charging upon the claims of descent and relationship might have been omitted, but it applied equally to the evidence of each side."

The District Court asserted in its charge, (R 49), "The burden of proof in this case is upon the plaintiffs and intervenors to show by a preponderance of the evidence that Wilson Strickyand, the son of Jacob and Priscilla and under whom they claim was the same person as the Wilson Strickland for whom the land was surveyed in 1838. In other words, gentlemen, the burden of proof is upon the plaintiffs and intervenors to establish by a preponderance of the evidence the affirmative answer to this issue I am submitting to you. The burden is not on the defendants to show that Wilson Strickland, the son of Jacob and Priscilla Strickland, the person under whom the plaintiffs claim is not the same person as the Wilson Strickland for whom the land was surveyed. The burden is upon the plaintiff and intervenors to establish that fact and if they haven't done so, you should return a verdict for the defendants and answer No--" In another portion of the charge (R 53) the court says: "I have the suggestion to make to you and I am sure you have carefully weighed and considered this testimony as it has gone along and analyzed it in your own minds without having discussed it among yourselves and in taking into consideration all the factors

that I have mentioned in considering the credibility of the witnesses and the reasonableness of the theories advanced and of the testimony of the witnesses as to whether or not the plaintiffs and intervenors have discharged the burden of proof placed upon them to establish by preponderance of the evidence the affirmative of this issue; that it comes down in the final analysis to the convictions at which jurors arrive.

I am sure at some time or other and I mention this by way of illustration only, you gentlemen have come in contact with a counterfeit coin. In all appearances, it might have the appearance of being a genuine coin, deceiving the naked eye and lots of people pass it and pay it out for purchases, with an honest belief that it is a genuine coin, but if you flip it in the air or cast it out on the table, there is a certain jingle or ring to it if it is a genuine coin and there is a thud if it is not a genuine coin and so as you carefully weigh this testimony, not that it might constitute any reflection upon the plaintiffs and intervenors in the case or upon these other parties who advanced in another court the theory that a certain alleged Wilson Strickland was the real Wilson Strickland, you might ask yourselves the question: "Does it jingle with the ring of genuieneness and of truth and of reasonableness, or does a consideration of the evidence on the whole result in a sort of thud that brands it as improbable and unreasonable and not genuine."

The first part of this charge unduly stressed the burden as was related to appellants by giving undue emphasis and by reiterating the burden as it was related to the plaintiffs and intervenors and did not properly deal with the question of burden as was related to the

defendants. The last portion of the charge was highly prejudicial and improper.

The court stressed its application to the evidence as it was related to the plaintiffs and intervenors and did not in this portion of the charge refer to the evidence of defendants. The illustration gave the jury the right to consider their experiences with facts not proven by the evidence as shown to exist by the record--to-wit, the experience they might have had in coming in contact with spurious coin and while the court disclaimed any intention of reflecting upon the integrity of plaintiffs and intervenors, yet the illustration and comment as made by the court could have but one effect, to-wit, that the contention as made by the plaintiffs was of the spurious type.

It must be borne in mind that all the evidence as offered by the plaintiffs and intervenors in this case was documentary, except and save only that which was related to the family tradition that they were of kin to the Wlison Strickland, who was the son of Jacob and Priscilla Strickland and that this Wilson Strickland had gone to Texas.

The language used by the court in connection with the charge and the illustration as made was hurtful in its nature -- was not justified by the evidence as introduced by plaintiffs and intervenors. It added an ingredient of poison that was death dealing in its nature and should be reversed.

CONCLUSION

The petition for Certiorari should be granted in order that this court may review the decision of the United

States Circuit Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

Oliver C. Hamrick

Walter F. Brown

Attorneys for
Celia Strickland et al. and
Jasper Pool et al.
Petitioners.

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

D. B. PHILLIPS
Norcross, Georgia

FLETCHER BROWN
Esperson Bldg., Houston, Texas

Of Counsel for
Celia Strickland et al. and
Jasper Pool, et al.
Petitioners in Certiorari

In the case under consideration there can be no doubt as to the proof offered by appellants in the court below, being sufficient to support the contention.

That the Wilson Strickland under whom appellants claimed the title to the lands involved and the Wilson Strickland for whom the survey was made were one and the same person.

They both bore the identical given, and sur-name. They both signed their names by His X mark.

The Wilson Strickland under whom appellants claim title was the son of Jacob and Priscilla Strickland, of Franklin County, Georgia (R 298). This Wilson Strickland signed his name by his X mark. (R 177) and was born Jan. 14, 1783. (R 293).

This Wilson Strickland lived at one time in Tennessee. (R 333).

This Wilson Strickland is not shown to have been in Georgia after July 1828, at which time he receipted his father's estate for $307.00 (R 368) and until 1839. (R 363).

This Wilson Strickland by family tradition went to Texas. (R 187 - 197 - 248 - 275 - 276 and 283).

This Wilson Strickland fought in the army of the Republic of Texas and acquired lands in Texas. (R 374).

This Wilson Strickland made a Will in 1841 in which, after making special devises, he willed the residue of his estate to his brothers and sisters and to the descendents of brothers and sisters. (R 173 - 177).

This Wilson Strickland died in Arkansas which was an adjoining state to Texas, in November 1841. (R 292).

The Wilson Strickland for whom the land was surveyed appeared in Texas in 1829. (R 388) the year after the last appearance of appellant's Wilson Strickland, in Georgia in July 1828).

This Wilson Strickland served in the army of Texas in a Company of Tennesseeans. (R 303).

This Wilson Strickland made a contract with Allen Vince on April 16, 1838 to recover a league and a labor of land and suit was brought upon this contract to enforce it, in which it was alleged that only a third of a league had been secured.

This Wilson Strickland signed his name to the contract by his X mark.

This Wilson Strickland for whom the land was surveyed is not shown to have been in Texas after April 16, 1938. He was definitely absent from the state of Texas in 1847 and had been for some time theretofore. (R 402).

We submit that under this record evidence, a presumption in law arises that appellants Wilson Strickland and the Wilson Strickland, the patentee, were one and the same and that upon proof of these facts, a perfect and dependable prima facie case had been made and that appellants would be entitled to prevail.

We further contend that upon this record evidence as to identity and that upon such a prima facie case being made that the burden of evidence shifted and that under the rules of law as applicable and as hereinbefore

cited, in the petition for certiorari, it then became the duty of the Appellees to assume the burden of making a counter showing.

We contend that the court holding to the contrary was reversible error. We further contend that the charge of the Court as complained of was objectionable for the reasons set forth in petition for certiorari. We further contend that the deductions of the court in commenting upon the question of identity are not in harmony with the record.

The evidence of the witness, Mrs. A. C. Barnes, as it is fully set out in the petition for certiorari was hearsay -- was self serving and extremely hurtful and prejudicial -- in fact, with the evidence of Mrs. Barnes out of the picture there was no evidence on the part of appellees, of probative value sufficient to rebut the presumption of law as related to identity as proven by the appellants.

None of the alleged persons who it was claimed to have borne the name of Wilson Strickland, other than appellants Wilson Strickland, were proven to be illiterate. No signatures of these other claimants were offered. No Bibles were introduced showing the date of birth or date of death of these other Wilson Stricklands.

Appellants Wilson Strickland was the only Wilson Strickland who had the ear marks of Wilson Strickland, the patentee; and his birth and death and place of burial was established by unimpeachable evidence.

The decision of the United States Circuit Court of Appeals as herein complained of, is we most urgently

contend, in conflict with local applicable decisions, in conflict with the decisions of other United States Circuit Court of Appeals touching the same matter and is a departure from the accepted and usual course of judicial proceedings and we contend is not in accord with any previous decision of any local court or any United States Circuit Court of Appeals, or for that matter, of the United States Supreme Court, touching the same matter.

Respectfully submitted,

Alex L. Hamrick

Walter F. Brown

Attorneys for
Celia Strickland et al. and
Jasper Pool et al.
Petitioners.

ROBERT B. BLACKBURN
1208 First National Bank Bldg.
Atlanta, Georgia

E. L. FOWLER
1103 Citizens & Southern Bank Bldg.
Atlanta, Georgia

B. P. SEAY
Oil & Gas Bldg., Houston, Texas

D. B. PHILLIPS
Norcross, Georgia

FLETCHER BROWN
Esperson Bldg., Houston, Texas

Of Counsel for
Celia Strickland et al. and
Jasper Pool, et al.
Petitioners in Certiorari